Circuit Court for Montgomery County
Case No. 430553-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2231

September Term, 2017

JESSE KELLEHER

v.

MONTGOMERY COUNTY, MARYLAND

Fader, C.J.,
Shaw Geter,
Sharer, J. Frederick,
(Senior Judge, Specifically Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: March 19, 2019

This appeal arises from a judicial review by the Circuit Court for Montgomery County of the Workers' Compensation Commission's modification of Appellant's permanent partial disability award. While performing duties related to his employment with Montgomery County, Maryland, Appellant was injured on February 6, 2007. On December 12, 2008, the Commission found Appellant had sustained a thirty percent impairment of his left knee and directed Montgomery County to compensate him. Appellant later filed a Request for Modification of that award in July 2011, which was granted. Appellant received the last payment of compensation pursuant to this award on November 10, 2011. Appellant then filed a Request for Modification alleging a worsening of his condition on June 9, 2016 and September 22, 2016, respectively. Following a hearing, the Commission found Appellant's partial permanent disability had worsened by five percent and directed Montgomery County to compensate him accordingly. Montgomery County noted an "on the record" appeal to the Circuit Court for Montgomery County alleging the statute of limitations had run and, thus relief was unavailable. Appellant requested a jury trial on the question of whether his Request for Modification was sufficient to toll the applicable statute of limitations. The circuit court struck the jury trial prayer, finding the question to be purely legal in nature. The circuit court then held that the statute of limitations had run and the Commission lacked the power to modify Appellant's award. Appellant brings this timely appeal and presents the following questions for our review:

1. Did the circuit court err in denying Appellant's request for a jury trial?

2. Did the circuit court err in finding Appellant's workers' compensation claim was barred by the statute of limitations?

3. Is Appellee's limitations argument moot because Appellee paid Appellant in February 2017?

STATEMENT OF FACTS

Appellant, Jesse Kelleher, was a firefighter employed by self-insured employer, Montgomery County, Maryland. On February 6, 2007, while fighting a fire, Kelleher slipped and fell on ice, seriously injuring his left knee. Kelleher filed for temporary total disability and permanent partial disability with the Worker's Compensation Commission (the "Commission"). On December 12, 2008, after a hearing, the Commission found, *inter alia*, that Kelleher sustained a thirty percent permanent impairment of his left knee and awarded him compensation.

In July 2011, Kelleher filed a Request for Modification of his award due to a worsening of his condition. Following a hearing, in an order dated October 28, 2011 (the "October 2011 Order"), the Commission found Kelleher's permanent partial disability had worsened to thirty-five percent in his left knee and ordered the County to pay Kelleher $283.00 per week. Kelleher received the last payment of compensation pursuant to the October 2011 Order on November 10, 2011.

Kelleher began to experience increased pain in his left knee in April 2016. He sought treatment from Dr. David Kowalk, his treating orthopedic surgeon, on April 14, 2016. Dr. Kowalk's report stated that Kelleher had "noted some catching and locking sensation" in his left knee during the six months prior to the appointment. The report also stated that "X-rays of left knee from [April 13, 2016] show significant degenerative

changes involving the medial compartment with joint space narrowing and osteophytes." During Kelleher's appointment with Dr. Kowalk, he was prescribed an unloading knee brace and injection therapy. In addition, Dr. Kowalk stated that Kelleher "may" require a total knee replacement.

On June 9, 2016, Kelleher filed a Request for Modification Issues form ("Request for Modification") with the Commission pursuant to Maryland Code Annotated, Labor & Employment ("L.E."), § 9-736(b), asserting that the permanent condition of his left knee had worsened and requesting a modification of the October 2011 Order. The Request for Modification stated, "Reopening due to worsening of condition: LEFT KNEE IN ADDITION TO ALL OTHER ISSUES." Kelleher filed another Request for Modification with the Commission on September 22, 2016, requesting a "[r]eopening due to worsening of condition: LEFT KNEE." Kelleher did not submit a written evaluation of permanent impairment with either Request for Modification.

On December 8, 2016, Kelleher submitted to a medical evaluation by the County's independent medical evaluator, Dr. Stuart Gordon. In a report addressing the findings of his evaluation, Dr. Gordon opined that the permanent impairment of Kelleher's knee increased by five percent. Dr. Kevin McGovern, Kelleher's original treating physician, evaluated Kelleher's anatomical impairment on December 20, 2016. In his report, Dr. McGovern opined that the permanent impairment to Kelleher's left knee increased by thirty-four percent since Kelleher's 2011 evaluation.

The Commission held an evidentiary hearing on January 4, 2017. At the hearing, the Commission reviewed the increased impairment ratings submitted by Kelleher and the County, Dr. Kowalk's medical report, and Kelleher's uncontradicted testimony.[1]

The County did not file an Issues form pursuant to Code of Maryland Regulation ("COMAR") 14.09.03.02 prior to or at the hearing. The County also did not object to Kelleher's Request for Modification at the hearing. However, after the hearing, on January 5, 2017, the County submitted a letter to the Commission alleging Kelleher's Request for Modification was outside the applicable five-year statute of limitations under L.E. § 9-736(b), and thus the Commission could not modify his award. The County argued Kelleher filed each of his Requests for Modification without first obtaining a written evaluation of impairment as required by COMAR 14.09.03.13(D) and 14.09.09.02(B). Kelleher's counsel, on January 13, 2017, wrote a letter to the Commission in response to the County's argument. In the letter, he argued that applicable case law only required Kelleher present medical evidence of the worsening at the time of the hearing, rather than at the time the Request for Modification was filed.

In an order dated January 31, 2017, the Commission found Kelleher's permanent partial disability to his left knee had increased to forty percent, demonstrating a five percent worsening. The Commission directed the County to pay Kelleher $283.00 every week for

[1] During direct examination, Kelleher testified:

> Q: Okay. And since 2011 has your knee condition or the symptoms in your knee stayed the same, have they gotten better, or have they gotten worse?
>
> A. It's gotten worse.

a period of fifteen weeks. The Commission "considered the arguments raised regarding the statute of limitations" and found "that the [Request for Modification] [was] not barred by the statute."

The County then filed an "on the record" appeal to the Circuit Court for Montgomery County on March 1, 2017 and Kelleher requested a jury trial. Kelleher intended to submit two questions to the jury: (1) whether the Request for Modification was filed, with "a basis in fact," within the five-year statute of limitations period pursuant to L.E. § 9-736(b) and (2) the nature and extent of the worsening of the condition of Kelleher's left knee. On May 9, 17, and 22, 2017, the circuit court heard oral argument from both parties and decided to allow the factual question regarding the nature and extent of the worsening of Kelleher's left knee to be submitted to a jury. However, the court found the question regarding the statute of limitations to be a "purely legal question," and struck Kelleher's request that it be placed before a jury. On October 31, 2017, the circuit court reversed the Commission, finding that Kelleher had not filed his Request for Modification with a written evaluation of permanent impairment as required by COMAR 14.09.09.02.

Kelleher filed a Motion for Reconsideration, or in the alternative, Remand, arguing, *inter alia*, (1) he did not have an opportunity to address the limitations issue since it was never raised prior to the hearing, (2) the Commission waived "strict compliance" with the applicable regulations, and (3) the circuit court imposed a new standard as to what was required to demonstrate that his condition worsened by November 10, 2016—the end of the limitations period. On December 11, 2017, the circuit court denied Kelleher's Motion for Reconsideration/Remand.

DISCUSSION

I. Whether the circuit court erred in denying Kelleher's request for a jury trial.

Kelleher contends he was improperly denied his right to a jury trial on the issue of whether his Request for Modification was filed within the five-year statute of limitations because it was a factual issue. Conversely, the County claims the circuit court's denial of Kelleher's request for a jury trial was proper because the appeal was "on the record," and the circuit court was required to accept the facts as found by the Commission.

At the outset, we note that an "appeal from the Workers' Compensation Commission may follow two alternative modalities." *Simmons v. Comfort Suites Hotel*, 185 Md. App. 203, 224 (2009). The first is an appeal "on the record of the Commission" pursuant to LE § 9-745(c) and (e). *Id*. In an "on the record appeal," "no new evidence is taken nor is any fresh fact-finding engaged in." *Board of Educ. for Montgomery Co. v. Spradlin*, 161 Md. App. 155, 170 (2005). Rather, "[t]he determination of whether the decision of the Commission was free from error will entail only an examination of the record of the proceedings before the Commission." *Id*. The court's review of the Commission's decision is limited to whether the Commission (1) justly considered all of the facts, (2) exceeded its powers, or (3) misconstrued the law and facts applicable in the case decided. L.E. § 9-745(c). We have clarified that "[m]isconstruing the facts" references "the issue of whether the Commission's fact-finding was, as a matter of law, clearly erroneous because it was not supported by legally sufficient evidence." *Spradlin*, 161 Md. App. at 169.

The second modality of appeal is known as an "essential trial *de novo*," pursuant to LE § 9-745A(d), which provides, "[o]n a motion of any party filed with the clerk of the court in accordance with the practice in civil cases, the court shall submit to a jury any question of fact involved in the case." *Spradlin*, 161 Md. App. at 171. A trial *de novo* is "diametrically different" from an "on the record appeal." *Id*. at 172. While a court in an on the record appeal reviews the Commission's decision for legal error, the essential trial *de novo* is "concerned only with findings of fact." *Id*. at 173. "The entitlement to fresh, *de novo* fact-finding is plenary and is not . . . dependent in any way on the notion that the Commission's original fact-finding was in error." *Id.* "At the *de novo* trial, the propriety of the Commission's original fact-finding is a matter of no consequence." *Id*. Additionally, "[e]ither party on the appeal to the circuit court may invoke the right to have a factual finding by the Commission determined *de novo* at the circuit court level." *Id*. at 176 ("Even though a party does not appeal, he can raise issues contesting the findings and decision of the Commission in an appeal taken by the other party."). Thus, when appealing the Commission's decision to a circuit court, whether a factual question may be properly submitted to the jury does not depend on the Commission's original decision, the party who noted the appeal, nor the type of appeal.

We must next determine whether the limitations question is one of fact or purely law. "Generally, the question of when a cause of action accrues is one that is properly decided by the court." *Lombardi v. Montgomery County*, 108 Md. App. 695, 711 (1996). However, there are "aspects to limitations defenses, most notably when the defense hinges upon a question of fact, which are not properly decided by the court and are better suited

for a jury." *Id*. Thus, "[w]hether a cause of action is barred by the statute of limitations is ordinarily a mixed question of law and fact that may be taken from the jury only when the court determines as a matter of law that the suit was not instituted within the proper time." *Dove v. Montgomery County Bd. of Educ.*, 178 Md. App. 702, 712 (2008).

In the present case, the limitations question was purely legal and appropriate for the court to decide. The County argued Kelleher's Request for Modification was not legally sufficient to toll the five-year statute of limitations under LE § 9-736(b). The County contended, as it does now, that Kelleher's Request for Modification did not allege a change in disability, with a "basis in fact," as he had not first obtained a written evaluation of permanent impairment as required by COMAR 14.09.09.02(B). Conversely, Kelleher argued his Request for Modification tolled the statute of limitations despite the lack of a written evaluation of permanent impairment. He alleged that the evidence he produced at the Commission hearing established a "basis in fact," meeting the requirements set forth in *Dove, supra*.

As we see it, whether Kelleher's Request for Modification was legally sufficient to toll the statute of limitations was not a question of fact for the jury to decide. The parties did not disagree as to when Kelleher filed his Requests for Modification, that he did so without first obtaining a written evaluation of permanent impairment, or when he obtained his final permanency ratings. Indeed, even Kelleher, in his brief, admits there "had been no objection by the County to any of the evidence" he produced at the hearing.

Kelleher, relying on *Dove, supra,* argues the limitations question in this case was a "mixed question of fact and law," which entitled him to have the matter submitted to a jury

under L.E. § 9-745(d). However, Kelleher's reliance is misplaced. In *Dove*, we merely held that a claimant need not produce all necessary medical documentation with his or her request for modification. 178 Md. App. at 714. In that case, the reviewing circuit court was tasked with deciding the purely legal question of whether the claimant's Request for Modification of temporary total disability benefits, which was filed without medical evidence, was barred by the statute of limitations. *Id*. at 713. The question was not submitted to a jury because, like here, there was no dispute as to any material fact.

Kelleher further claims that his right to a jury trial in this case is mandated by the Maryland Constitution, which provides: "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $15,000, shall be inviolably preserved." Md. Const. art. 23. However, as we have stated, the limitations question involved no question of fact. Thus, Kelleher had no constitutional right to a jury trial on the issue.

II. Whether the court erred in finding Kelleher's workers' compensation claim was barred by the statute of limitations.

When reviewing an administrative agency's decision, "we reevaluate the decision of the agency, not the decision of the lower court." *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450 (2002). The "judicial review of administrative agency action is narrow" and our "task on review is *not* to substitute [our] judgment for the expertise of those persons who constitute the administrative agency." *Id*. (emphasis in original). Instead, our review is limited to "whether the Commission (1) justly considered all of the facts about the accidental personal injury, . . . (2) exceeded the powers granted to

it under [the Workers' Compensation Act], or (3) misconstrued the law and facts applicable in the case decided." L.E. § 9-745(c). We further note that on appeal, pursuant to L.E. § 9-745(b), "the decision of the Commission is presumed to be prima facie correct" and "the party challenging the decision has the burden of proof." *Simmons v. Comfort Suites Hotel*, 185 Md. App. 203, 211 (2009). This presumption of correctness only applies "when the issue on appeal to the circuit court is one of fact and not law." *Id*. Thus, while we presume the decision of the Commission is prima facie correct, we review the Commission's application of the law *de novo*. *Department of Human Resources v. Thompson*, 103 Md. App. 175, 190–91 (1995).

Kelleher argues the filing of his Request for Modification was legally sufficient to toll the statute of limitations, and, if it was not, the Commission waived the issue when it found the Request for Modification was not barred. Conversely, the County claims the Commission was without power to modify Kelleher's award because the statute of limitations had run on his claim as he had no "basis in fact" to support a change in his disability status when he filed his Request for Modification.

"The period of limitations applicable to petitions to reopen, currently embodied in L.E. [§] 9-736, has in one form or another . . . been a part of the Workers' Compensation Act since its inception in 1914." *Buskirk v. C.J. Langenfelder & Son, Inc.*, 136 Md. App. 261, 269 (2001). L.E. § 9-736 provides, in relevant part:

> (b)(1) The Commission has continuing powers and jurisdiction over each claim under this title.
> (2) Subject to paragraph (3) of this Subsection, the Commission may modify any finding or order as the Commission considers justified.

> (3) Except as provided in subsection (c) of this section, the Commission may not modify an award unless the modification is applied for within 5 years after the latter of:
>
> (i) the date of the accident;
>
> (ii) the date of disablement; or
>
> (iii) the last compensation payment.

The intent of the General Assembly in enacting L.E. § 9-736 was "to restrict the Commission's authority to reopen prior awards." *Buskirk*, 136 Md. App. at 270. Ordinarily, remedial legislation, such as the Workers' Compensation Act, is "construed liberally in favor of injured employees in order to effectuate the legislation's remedial purpose." *Id*. However, "[t]his general rule of construction does not apply to limitations provisions" like L.E. § 9-736. *Id*. at 270–71 (citing *Stevens v. Rite-Aid Corp.*, 340 Md. 555, 569 (1995)).

L.E. § 9-736(a) allows the Commission, upon the application of a claimant, to "readjust for future application the rate of compensation" upon "aggravation, diminution, or termination of [the claimant's] disability." However, L.E. § 9-736(b)(3) provides that "the Commission may *not* modify an award unless the modification is applied for "within five-years after . . . the last compensation payment."[2] (emphasis added). "Ordinarily, a time limitation is deemed a condition precedent if it is fixed in the statute that creates the cause of action[.]" *Griggs v. C & H Mechanical Corp.*, 169 Md. App. 556, 571 (2006). Thus, a claimant must establish that he or she sufficiently filed for worsening of a disability within the statute of limitations before the Commission is empowered to modify the

[2] Although LE § 9-736(b)(3) provides that the Commission may modify an award if the claimant requests such modification within five years after "(i) the date of the accident" or "(ii) the date of disablement," these are not applicable in this case.

claimant's award. Accordingly, if Kelleher failed to sufficiently file his Request for Modification within the five-year statute of limitations, the Commission exceeded its authority in modifying the award.

In addition to filing within the five-year statute of limitations period, a claimant must abide by regulations adopted by the Commission. The General Assembly empowered the Commission to adopt "regulations to govern the procedures of the Commission" and "determine the nature and the form of an application for benefits or compensation." L.E. § 9-701(2). Pursuant to this authority, the Commission adopted COMAR 14.09.03.13, which mandates that "a party seek[ing] an increase in a prior award for permanent partial disability . . . shall comply with . . . COMAR 14.09.09." COMAR 14.09.09.02 provides, "[p]rior to filing an Issues form raising permanent disability, the party filing the issue shall have obtained a written evaluation of permanent impairment prepared by a physician, psychologist, or psychiatrist in accordance with [the American Medical Association's "Guides to the Evaluation of Permanent Impairment]." *See also, Id*. at 14.09.09.03. "It is well settled in Maryland that unless the context indicates otherwise the word 'shall' is presumed to have a mandatory meaning inconsistent with the exercise of discretion." *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 259 (2012).

In *McLaughlin v. Gill Simpson Elec.*, we held that a claimant's request to reopen for worsening of condition was barred by the statute of limitations due to the claimant's failure to comply with the Commission's regulations. 206 Md. App. at 264. In that case, the claimant filed a Request for Modification, which indicated that his permanent partial disability had increased, with an Issues form that alleged only a request for medical

treatment. *Id*. at 248. Subsequently, the issue of his medical treatment was resolved and the Issue was withdrawn. *Id*. The claimant, after the five-year statute of limitations had expired, requested the Commission modify his award due to a worsening of his condition. *Id.* He argued that his claim for worsening of condition was not barred by limitations because he never withdrew his Request for Modification, which indicated that his permanent partial disability increased. *Id*. at 249–50. We disagreed and held the Request for Modification was barred because the claimant never filed an Issues form expressly claiming permanent disability with the Request for Modification as required by, at that time, COMAR 14.09.01.12A (now 14.09.03.13). *Id.* at 262–63.

Here, Kelleher's Request for Modification did not satisfy the requirements imposed by the regulations. Although it is undisputed Kelleher filed a Request for Modification on June 9, 2016 and September 22, 2016, respectively, he did so without first obtaining a written evaluation of permanent impairment as required by COMAR 14.09.09.02. In fact, he did not obtain a written evaluation of permanent impairment until December 2016, almost two months after he filed his Request for Modification and one month after the statute of limitations had run. Accordingly, his Request for Modification was not legally sufficient to toll the statute of limitations and the Commission was without the power to modify his award.

Kelleher argues that *Dove*, established that "[t]he plain language of [L.E.] § 9-736(b) does not specify any requirement of filing supporting documentation with a request for modification of an award of compensation. Rather, at the time of filing the claimant is only required to provide relevant medical information to the other involved parties (i.e.

employer and insurer) that is in his or her possession." 178 Md. App. 702, 715–16 (2008). Kelleher's reliance, however, is misplaced for two reasons.

First, when *Dove* was decided, the regulations discussed above had not been adopted by the Commission. *Dove* was decided in 2008, and the Commission adopted COMAR 14.09.03.13 in 2014. 41:4 Md. R. (Feb. 21, 2014). Thus, the applicability of our holding in *Dove* to this case is limited.

Second, even if our holding in *Dove* was applicable, in that case we further explained that a claimant must show that he or she applied for a worsening of permanent impairment with a "basis in fact":

> the claimant must produce such documentation at the time of the hearing before the Commission and it must show that a change in disability occurred *during* the period covered by the applicable statute of limitations. A claimant would not be permitted to adduce evidence showing a change in disability status after the running of the statute of limitations.

Id. at 714 (emphasis added). In this case, at the Commission hearing, Kelleher provided a report by Dr. Kevin McGovern, dated December 20, 2016, indicating the condition of his knee worsened thirty-four percent and a medical report by Dr. Stuart Gordon, dated December 8, 2016, that indicated a five percent worsening. These evaluations occurred after Kelleher filed his Request for Modification and after the five-year statute of limitations had run. Accordingly, by either standard, Kelleher's Request for Modification did not toll the five-year statute of limitations under L.E. § 9-736.

Kelleher argues the Commission's regulations and L.E. § 9-736(b) are inconsistent as COMAR 14.09.09.02 requires more of a claimant than merely *applying*, with a "basis in fact," for the benefits as required under the statute. He asserts, "[w]here the language of

a statute differs from relevant language in a departmental regulation, the statutory language must control." *Cecil County Dep't of Soc. Servs. v. Russe*l, 159 Md. App. 594, 611 (2004). Thus, he argues, his filing of his Request for Modification (i.e. application) was sufficient under L.E. § 9-736(b), and the inconsistent regulation should not apply. We do not agree.

In *Dove*, we interpreted L.E. § 9-736(b) to require that a claimant apply for benefits with a "basis in fact," i.e. "produce documentation" to "show that a change in disability occurred during the period covered by the applicable statute of limitations." 178 Md. App. 702, 714 (2008). COMAR 14.09.09.02, which requires a claimant obtain a written evaluation of permanent impairment prior to filing a Request for Modification, was simply adopted to assure that claimants are filing for permanent partial disability with a "basis in fact." Thus, the Commission's regulations are complimentary with L.E. § 9-736, rather than inconsistent.

Kelleher also claims the Commission waived strict compliance with the applicable regulations, citing COMAR 14.09.01.06, which provides "[w]hen justice so requires, the Commission may waive strict compliance with these regulations." However, we have held "the statute of limitations in L.E. § 9-736(b) is to be strictly construed." *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 254 (2012). As such, the Commission did not have the authority to waive the requirements relating to the statute of limitations enacted in L.E. § 9-736(b) by the General Assembly.

Kelleher argues the County waived the limitations issue because it raised the issue after the Commission hearing and not in its Issues form prior to the hearing. We find this argument meritless and Kelleher has cited no legal authority to support this contention.

Indeed, COMAR 14.09.09.02 only requires that "[a] *claimant* alleging permanent disability shall file with the Commission an Issues Form[.]" (emphasis added). COMAR 14.09.03.02 provides, "[a]fter the claim has commenced, any party *may* raise an issue by filing an Issues form, available on the Commission website." (emphasis added). The use of the word "may" does not denote a requirement, but rather implies discretion. Further, where "the cause of action was previously cognizable either at common law or by virtue of another statute," the "statutory time limitation must be pleaded as the affirmative defense of statute of limitations." *Griggs v. C & H Mechanical Corp.*, 169 Md. App. 556, 571 (2006) (contrasting statutory time limitations of causes of action available at common law and by virtue of another statute from time limitations fixed within the statue giving rise to cause of action). As we have stated, in L.E. § 9-736, the time limitation is fixed in the same statute that gives rise to a claimant's right to have the Commission modify his or her award. Accordingly, the County was not required to affirmatively plead the limitations defense.

Kelleher argues "the Commission made a factual determination regarding . . . whether he had a 'basis in fact' to file a [Request for Modification], e.g. whether limitations had run" and that this finding was "*prima facie* correct and should not have been reversed as a matter of law." It is true that in examining the decision of an administrative agency, "not only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inference." *Bullock v. Pelham Wood Apartments*, 283 Md. 505, 513 (1978). However, pursuant to L.E. § 9-745(c), we are tasked with deciding "whether the Commission . . . exceeded the powers granted to it under [the Workers' Compensation Act]." As previously

stated, this is a purely legal question and Kelleher's Request for Modification, as a matter of law, was not legally sufficient to toll the statute of limitations. Thus, the Commission's finding receives no deference.

Kelleher further claims "[c]ivil due process requires that the court not rule on an Issue where it had not been raised before the Commission." He seems to ignore that the County submitted a letter to the Commission outlining their argument regarding the limitations issue and Kelleher was given the chance to, and in fact did, respond. The Commission then fully considered the limitations issue and found, in its second order, that Kelleher's claim was not barred. Additionally, where "the period of limitation is part of the substantive right," as it is here, "the burden is on the plaintiff to prove that the action was initiated within the prescribed time period." *Griggs v. C & H Mechanical Corp.*, 169 Md. App. 556, 570 (2006) (citing *Anderson v. Sheffield*, 53 Md. App. 583, 586 (1983)). Kelleher failed to meet this burden.

In sum, the Commission erred when it modified Kelleher's award. To hold otherwise "would allow all recipients of workers' compensation to file a protective petition for modification and avoid the statute of limitations in the event a change in disability status occurred at a future date." *Buskirk v. C.J. Langenfelder & Son*, Inc., 136 Md. App. 261, 272 (2001).

III. Whether the County's limitations argument is moot because the County paid Kelleher in February 2017.

Kelleher contends the limitations issue which we have addressed was rendered moot when, on February 2, 2017, the County paid him permanent partial disability compensation

as directed by the Commission in its January 31, 2017 order. According to Kelleher, as of February 2, 2017, the limitations clock was restarted under L.E. § 9-736, and thus the Commission had the authority to modify his award.

The County argues that because L.E. § 9-736 provides that a petition for judicial review from a decision of the Commission does not operate to stay a compensation order, it was obligated to pay the partial permanent disability compensation award regardless of appeal. It maintains the purpose of the anti-stay provision is to ensure that workers are paid their benefits in a timely fashion and, in light of the anti-stay provision, payment of a compensation award is not a waiver of a limitations defense and does not create a new tolling period that moots that defense. We agree.

A "court may not grant a stay" or an injunction of a workers' compensation award pending appeal. *Gleneagles, Inc. v. Hanks*, 385 Md. 492, 497 (2005). This is so because the Workers' Compensation Act's "humanitarian policy would be seriously hampered if weekly payments of compensation awarded by the [C]ommission could be suspended because of an appeal." *Id*. at 500 (citing *Branch v. Indemnity Ins. Co.*, 156 Md. 482, 489 (1929)). Additionally, a claimant who is awarded compensation by the Commission, but whose compensation award is reversed on appeal, is not required to repay the monies already received. *See Id*. at 502. Thus, the benevolent purposes of the Act are served and the claimant remains protected during the pendency of an appeal challenging an award of compensation. Kelleher has cited no legal authority supporting his contention that the payment of permanent partial disability compensation as ordered will moot an appeal in which the Commission's award of that compensation is being challenged as an error of

law. If we were to hold such, we would effectively eviscerate the ability of an employer or insurer to challenge an erroneous limitations ruling by the Commission. Accordingly, we hold the compensation Kelleher received pursuant to the January 31, 2017 order did not render this appeal moot.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.